STATE OF MICHIGAN

IN THE SUPREME COURT

LANZO CONSTRUCTION COMPANY,

Plaintiff-Appellant,

vs.

WAYNE STEEL ERECTORS, a Michigan corporation,

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 264165

Wayne County Circuit Court
Case No. 04-408824 CK

/

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ANSWER BY DEFENDANT-APPELLEE, WAYNE STEEL ERECTORS, TO APPLICATION FOR LEAVE TO APPEAL BY PLAINTIFF-APPELLANT, LANZO CONSTRUCTION COMPANY

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STATEMENT OF JURISDICTION

Defendant-appellee, Wayne Steel Erectors, agrees that this court has jurisdiction of the plaintiff-appellant Lanzo Construction Company's Application for Leave to Appeal pursuant to MCR 7.302 from the Court of Appeals Opinion of January 26, 2006 affirming summary disposition granted by the trial court to Wayne Steel Erectors (Exhibit T) and the Order of the Court of Appeals of March 16, 2006 denying Lanzo Construction Company's motion for reconsideration (Exhibit U). However, as will be pointed out in the following section of this brief, Wayne Steel does not agree that Lanzo has set forth an appropriate ground for this Application for Leave to Appeal as required by MCR 7.302(B).

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Is a claim for contractual indemnity by a general contractor [Lanzo] on a construction project for an injury to an employee of a subcontractor [Wayne Steel] barred by the construction indemnity statute, MCL 600.991, where it is undisputed that the accident was caused by the sole negligence of the general contractor, and the conditions which caused the injury were all the sole responsibility of the general contractor?

Court of Appeals says the answer is "yes".

Defendant-appellee, Wayne Steel Erectors, says the answer is "yes".

Plaintiff-appellant, Lanzo Construction Company, says the answer is "no".

2. Can a general contractor on a construction project [Lanzo] avoid all of the undisputed evidence including the admissions of its own employees, that it was solely negligent in causing a construction accident, and the testimony of the underlying plaintiff that he was not negligent, through a statement by the underlying plaintiff unsupported by any factual basis that he "may have been partially at fault" for the accident, which was made as part of the settlement agreement with the general contractor [Lanzo] in order for the underlying plaintiff to receive the underlying settlement?

Court of Appeals says the answer is "no".

Defendant-appellee, Wayne Steel Erectors, says the answer is "no".

Plaintiff-appellant, Lanzo Construction Company, says the answer is "yes".

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REASONS WHY LEAVE TO APPEAL SHOULD BE DENIED

The first section of Lanzo's brief (pp ix-xi) argues why leave should be granted.

MCR 7.302(B) sets forth the grounds that an Application must show to be granted, and the only applicable ground is:

> (3) The issue involves legal principles of major significance to the state's jurisprudence; . . .

Lanzo argues first that numerous decisions of the Court of Appeals "fight with one another" about what methodology should be used to decide cases involving contractual indemnity. Lanzo cites *Martin v City of East Lansing*, 249 Mich App 288, 291 (2001) (The case at the cite is *Hubbell, Roth & Clark v J. D. Contractors*, 249 Mich App 288 (2002)); *Paquin v Harnischfeger*, 113 Mich App 43, 53 (1992); *Pritts v J. I. Case*, 108 Mich App 22, 28 (1995) (an appeal which I handled); *Chrysler v Brencal*, 146 Mich App 766, 772 (1985) and *Sherman v DeMaria*, 203 Mich App 593, 598-99 (1994) (Lanzo's brief, p ix). Contrary to Lanzo's argument, these cases do not set forth any divergent test, but rather, all agree on the same test for interpreting contractual indemnity contracts, that the contract is to be construed in accordance with the rules for construction of contracts generally. The cardinal rule is to enforce them so as to effectuate the intention of the parties. The intention is determined by considering not only the language of the contract, but also the situation of the parties and the circumstances surrounding the contract. Indemnity contracts are construed against the party who drafts them and against the party who is the indemnitee. These cases all cite the numerous prior cases from which these rules were developed including the Supreme Court decision in *VandenBosch v Consumers Power Co.*, 394 Mich 428 (1995). The Court of

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Appeals panel in this case recognized and applied these same rules. (Exhibit T, p 3)

Lanzo argues next that the Michigan Court of Appeals has "increasingly shown . . . a disregard for an indemnitees' right to have its alleged negligence determined by a jury." (Lanzo's brief, p ix) Lanzo cites no cases in support of this false statement.

Lanzo argues next that the court in this case should have given the same result as in the case of *Papalas v Ford Motor*, unpublished per curiam decision of the Michigan Court of Appeals, docket number 252470 (2005). The Court of Appeals panel in the *Papalas* case had two of the same members as the current case, Judges Donofrio and Borrello, who had issued the *Papalas* decision only two months before oral argument in this case, and were very familiar with their decision. Despite Lanzo's arguments regarding the *Papalas* case to the panel at oral argument, the panel clearly did not agree with Lanzo's interpretation of the case. As Wayne Steel pointed out to the panel at oral argument, the *Papalas* case held that the indemnitee Ford could obtain contractual indemnity for its ***own*** negligence but not for its ***sole*** negligence. Contrary to the current case there was evidence of negligence by parties other than Ford including Walbridge Aldinger, Commercial Contracting Company, Rouge Steel Company and Metro Industrial Piping. (Opinion, p 7)

Contrary to Lanzo's brief, there is no confusion regarding indemnity law, the indemnity rules have been repeated in numerous Michigan appellate cases, and have not changed. This case is a classic example why the legislature enacted MCL 691.991. It was intended to prevent a careless and negligent general contractor such as Lanzo from attempting to immunize itself from liability by forcing its subcontractor to enter a contract requiring indemnity for its sole negligence. Lanzo, which had 228 MIOSHA violations totalling over

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1.5 million dollars in penalties in the one year period before the accident and was also the subject of criminal charges for involuntary manslaughter (Exhibit V), is the exact type contractor the statute was intended to effect.

Lanzo should not be allowed to misrepresent the record to attempt to obtain appellate review. As will be pointed out hereafter, there is no genuine issue as to any material fact in this matter, Lanzo was solely negligent in causing the underlying plaintiff Agueros' injury and is clearly not entitled to contractual indemnity from any party as provided by MCL 691.991. Contractual indemnity law and the enforcement of MCL 691.991 are not the subject of any dispute and the issues on this Application for Leave to Appeal certainly do not involve any legal principles of major significance to the state's jurisprudence as applied to this case.

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COUNTER-STATEMENT OF FACTS

The defendant-appellee, Wayne Steel Erectors ("Wayne Steel"), objects to the statement of facts contained in the brief in support of Lanzo's Application for Leave to Appeal which is inaccurate and misleading. Lanzo's conduct in both the underlying case and the current case was intended to prevent discovery of its own negligence. Lanzo's refusal to partake in discovery was the subject of motions and orders in both cases. When Lanzo's representatives were produced, they admitted Lanzo's sole responsibility for the conditions which caused the underlying accident. Lanzo's arguments in the trial court, Court of Appeals and in its Application for Leave to Appeal are based on misrepresentations of the testimony from the underlying action and the current case.

A. UNDERLYING CLAIM BY AGUEROS AGAINST LANZO.

1. COMPLAINT AND DISCOVERY.

The current case arises out of an underlying action filed by *Fernando Agueros v Lanzo Construction Company*, Wayne County Civil Action No. 02-211018-NO, which was filed on 4/3/02. (Copy of underlying complaint attached as Exhibit A) The complaint alleged that Lanzo was the general contractor for the construction project and Lanzo was negligent in causing injury to Agueros which occurred when Agueros was carrying metal rods through debris on the project in a common work area. (See underlying complaint as Exhibit A)

Lanzo failed to timely answer the complaint and was defaulted. The default was then set aside by order of the court of 8/29/02. (See order attached as Exhibit B)

Discovery then proceeded, but Lanzo refused numerous requests to produce its employees and representatives for depositions resulting in a motion for default judgment filed by the plaintiff Agueros against Lanzo. (See motion for default judgment attached as Exhibit

C)

The trial court heard oral argument of the motion and ordered that Lanzo produce its representatives for depositions within 21 days and assessed costs against Lanzo of $5,000. (Order to compel depositions and assess costs attached as Exhibit D)

Lanzo had attempted to avoid producing its representatives to avoid providing their testimony which would establish Lanzo's negligence. In response to the court's order, Lanzo only produced Joseph Czerak for deposition, who was deposed on 7/1/03 in the underlying case. Czerak testified that he had been hired as Lanzo's safety director on 3/11/01, seven months ***after*** the Agueros accident, that he had no knowledge of the Agueros accident or the project at the time of the accident, and that he had discussed the case with Jack Parinello, Lanzo's superintendent, who advised that he did not recall anything about the accident. Lanzo thus succeeded in preventing the underlying plaintiff Agueros from discovering information about Lanzo's negligence.

2. AGUEROS DEPOSITION.

The underlying plaintiff was deposed in the underlying action on 7/1/03 and testified:

(a) He was an ironworker employed by Wayne Steel since June, 1999. (Exhibit E, Agueros dep, pp 20-21)

(b) The foreman for the project for the Wayne Steel crew was Armando Barcenas. (Exhibit E, p 28)

(c) The project was the construction of a water treatment plant which was below grade. He worked on the project for Wayne Steel for at least six months before he was injured on August 28, 2000. (Exhibit E, pp 29-30)

(d) At the time he was injured he was working on a platform about three

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stories above the bottom of the structure, and the ground was concrete with steel dowels protruding out and up like spears. (Exhibit E, pp 29-30, 39-40, 74)

(e) There were also Lanzo laborers and employees of other subcontractors working on the same level as the Wayne Steel crew at the time of the accident. (Exhibit E, pp 42-43, 47-48)

(f) It was not the responsibility of Wayne Steel to pick up other contractors' or laborers' debris on the project. (Exhibit E, pp 45-47)

(g) At the time of the accident the condition of the work area on the level where the accident occurred was "messy", there was cut wood laying all over, plus bolts, boxes, plastic and thermalation. (Exhibit E, pp 48-52) ***None*** of this debris was from Wayne Steel. (Exhibit E, p 49) The wood debris was from the Lanzo carpenters. (Exhibit E, pp 50-51)

(h) The debris on the floor was not supposed to be there, and in the area where the injury occurred there were bolts, insulation, plastic and wood. (Exhibit E, p , 61-67)

(i) The debris was bad the day of his injury, because the ***Lanzo*** laborers had not cleaned up before the Wayne Steel crew began working. (Exhibit E, p 123)

(j) Contrary to Lanzo's brief (p 5, n 27) that Agueros contributed to the debris himself, the page of the Agueros dep cited by Lanzo states that Agueros would toss rebar scraps into a wheelbarrow, and that there was no rebar laying around at the site of the accident. (Exhibit E, pp 44-45, 63-64)

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(k) Contrary to Lanzo's brief (p 5, n 27) that Agueros testified that the debris had nothing to do with his trip and fall, Agueros testified that he did not trip over anything when he lost his balance, but that he was forced to take a circuitous path which took him near the column and rail where the accident occurred because of the debris on the floor, that he was trying to avoid the debris at the time of the incident, that the debris should not have been there, and that he was off balance because of the debris when the incident occurred. (Exhibit E, pp 65, 85-89)

(l) Contrary to Lanzo's brief (p 8) that Agueros chose his own path as he walked with the bundles of re-bar and that he was carrying the re-bar too close to the guardrail ("a mere two inches"), when he tripped and fell, as indicated above, Agueros testified that he was forced to take a circuitous path which took him near the column and rail because of the debris on the floor, which should not have been there (Exhibit E, p 65, 85-89), that he was not "two inches" from the guardrail, but rather four to six feet from the guardrail, and that he was already off balance from stepping over the debris when the end of the re-rod contacted the column. (Exhibit E, pp 88-89)

(m) ***The guardrail on the level where the injury occurred was very weak and very insecure and "wobbled" and "tipped back and forth"***:

Q What, and how was the railing?
A The railing was very, very weak. It was very unsecure. . . . .
Q What did you say to Armando?
A It wasn't really a complaint. I just basically took it and it was I would say maybe 24 feet long. Well, about 20 feet long. I took the one side and just

went like this with it and the whole thing just as one of these, you know, like wobbled, tipped back and forth. I said look at this . . . . (Exhibit E, pp 56-58)

(n) This railing was "very dangerous". (Exhibit E, p 59)

(o) Contrary to Lanzo's brief (p 4) that Agueros and Wayne Steel had a duty to observe the weak guardrail and report it, Agueros testified that the railing was installed by the Lanzo carpenters and it was not Wayne Steel's job to have anything to do with it. (Exhibit E, p 123)

(p) Contrary to Lanzo's brief (p 5) that Agueros' accident was caused because of his negligence in failing to calculate where he was walking and how much room he had, Agueros testified that he was carrying four to six, eight to ten foot long re-bar weighing sixty to eighty pounds on his right shoulder (Exhibit E, pp 81-82, 85-89) and that he was walking through the debris because there was no other path, which brought him near the column and the guardrail. He was off balance from stepping over debris, when the re-bar came in contact with the column. He jerked his back to prevent himself from falling against the rail, because he knew the rail was weak and would not hold him and he would have fallen three stories onto solid concrete and steel dowels pointing up. He knew the guardrail was very insecure and weak and dangerous, and it was his jerking motion to avoid the guardrail which caused his injury (Exhibit E, pp 58-59, 85-89):

Q At what point did you feel that you injured yourself?
A When I went forward to avoid going backwards.
Q Why did you go forward to avoid going

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backwards?

A ***Because I wasn't going to go against that rail. I didn't trust that rail. I knew it wasn't going to hold me, I wasn't going to go down. So I had one option, that was to go forward.***

Q ***Was it that jerking motion that caused, before that caused your injury?***

A ***Yes.***

Q What type of fear, if any, did you have about striking the railing?

A ***Your life passes before you. You just, like I say, I wasn't going to go \backwards because you knew that that railing was not going to hold.***

Q ***If the railing wouldn't have held you, what would have been below?***

A ***Solid concrete and steel dowels coming out of the concrete.*** (Exhibit E, pp 124-125, emphasis added)

(q) Contrary to Lanzo's brief (p 5) there is no issue of fact, Agueros did not identify a risk, choose a path that happened to be littered with debris and then his own "miscalculation" caused his injury when the re-bar hit the column causing him to lose his balance. The undisputed testimony from Agueros was that he did not choose the path, it was the only way he could go, the only clear path brought him near the guardrail and the column, the fact the re-bar struck the column was not negligence or the cause of the injury, rather it was the debris forcing him to take the path and lose his balance and the weak guardrail which would not protect him, which were both solely the responsibility of Lanzo.

3. LANZO MOTION FOR SUMMARY DISPOSITION.

Following the deposition of Agueros, Lanzo filed a motion for summary disposition arguing that the condition of the railing was open and obvious. Agueros responded arguing that Lanzo, as the general contractor, had safety responsibility for the premises, and was

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clearly negligent for failing to provide an adequate safety railing, and further, that Lanzo had a history of having a "careless attitude" toward safety regulations and had been cited repeatedly for multiple MIOSHA violations resulting in 228 violations totalling over 1.5 million dollars in penalties in a one year period, and that the Michigan Attorney General had brought criminal charges of involuntary manslaughter against an executive of Lanzo as a result of a work-site death. (Exhibit V, Agueros' response brief, p 10) The trial court denied Lanzo's motion for summary disposition.

4. **FIRST NOTICE TO WAYNE STEEL.**

Lanzo did not file a third party complaint against Wayne Steel in the underlying Agueros case. By correspondence of 3/17/04, close to the conclusion of the underlying case, and just prior to the settlement conference, Lanzo, for the ***first*** time, provided notice to Wayne Steel of the Agueros claim against Lanzo, and tendered its defense in the Agueros case to Wayne Steel. This was almost two full years after the Agueros case had been filed and pending. Contrary to the false impression in Lanzo's brief that after Agueros sued Lanzo, Lanzo tendered its defense to Wayne Steel (Lanzo's brief, p 1), Lanzo did not file a third party complaint against Wayne Steel in the underlying case, and did not even provide any notice to Wayne Steel or tender the defense until 3/17/04, two years after the case was filed, and just prior to the settlement conference.

5. **AGUEROS SETTLEMENT.**

A settlement conference was then held in the underlying Agueros case on 7/29/04. The settlement conference was attended by an attorney representing Wayne Steel, who advised the court that he had appeared at the settlement conference in response to notice provided by Lanzo, but that Wayne Steel had not been made a party to the action, and denied any liability or responsibility whatsoever. (Transcript of settlement conference attached as Exhibit J, pp 6-

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7)

At the settlement conference, the plaintiff and Lanzo announced that they had resolved the Agueros claim against Lanzo that day for $125,000. The trial court approved the settlement. (Exhibit F, pp 6-7) As part of the settlement, between Agueros and Lanzo, Agueros stated in response to a question that he "***may*** have been partially at fault" for the accident:

> Q And isn't it true that you may have been partially at fault for this accident?
> A Yes.
> . . . .
> MR. KUDLA: Just one question of Mr. Agueros. Mr. Agueros the admission you made with regard to your comparative negligence in this case was done freely and voluntarily?
>
> A Yes. (Exhibit F, pp 6-7)

There was no statement on the record of any facts in support of the statement by Agueros that he "***may have been*** partially at fault. . ." (emphasis added) This "statement" was clearly part of the "settlement agreement" between Agueros and Lanzo. At no time prior to the settlement did Lanzo ever tender the settlement amount to Wayne Steel or advise Wayne Steel that if Wayne Steel did not undertake to provide indemnity and a defense to Lanzo, that Lanzo would settle the Agueros claim for the proposed settlement amount.

B. CLAIM BY LANZO AGAINST WAYNE STEEL.

1. COMPLAINT AND DISCOVERY.

On 3/27/04, after tendering its defense to Wayne Steel, Lanzo filed the current case against Wayne Steel seeking contractual indemnity. (complaint attached as Exhibit L)

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Lanzo used the same tactic it used in the Agueros case in refusing to respond to discovery requests or produce its employees and representatives for depositions, in order to attempt to avoid disclosing that the Agueros accident was caused by Lanzo's sole negligence.

As a result Wayne Steel filed a motion on 2/11/05 (Exhibit G) to dismiss Lanzo's complaint and to award sanctions because Lanzo had refused to produce its employees or representatives for depositions, and had failed to respond to Wayne Steel's request to produce requesting the contract documents and specifications.

In response to Wayne Steel's motion, the court ordered Lanzo to produce its representative with the most knowledge regarding Lanzo's claims against Wayne Steel, to produce its representatives with most knowledge regarding the underlying accident and in regard to the responsibility for debris and the guardrails and to produce the requested contract documents. (See order attached as Exhibit H)

2. **PARINELLO DEPOSITION.**

In response to the court's discovery order, Lanzo advised that Jack Parinello was the person from Lanzo with the most knowledge regarding the responsibility for debris in the accident area and with the most knowledge regarding the installation and maintenance of guardrails in the accident area. Lanzo had succeeded in not producing Parinello for deposition in the underlying Agueros case. Parinello was then deposed by Wayne Steel on 3/14/05 and testified:

(a) He was employed as general superintendent for Lanzo for the entire Leib Screening and Disinfection Facility Project. (Exhibit I, Parinello dep, pp 6-7)

(b) There were numerous subs of Lanzo on the job including Wayne Steel, the steel subcontractor, a plumbing subcontractor, a duct work

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subcontractor, a tunneling subcontractor, a roofing subcontractor and an electrical subcontractor. (Exhibit I, pp 9-10)

(c) ***Wayne Steel was the best sub Parinello ever had on this job or any other job and they did their work in a safe fashion and he had no complaints about them***:

> Q How as the performance of Wayne Steel for Lanzo on the Leib job?
> A In my opinion they were great. They were the best sub I had.
> Q On that job or any job?
> A Any job; and that job, of course.
> Q They did the work in a safe fashion?
> A Yes. They did a good job all the way around. I don't have any complaints. (Exhibit I, p 11)

(d) Parinello had no information regarding the underlying plaintiff Agueros. Parinello was in charge of investigations for accidents for Lanzo, but never saw any investigation regarding the Agueros accident, and there was no investigation done to his knowledge of the Agueros accident. (Exhibit I, pp 10, 17, 26-27)

(e) Parinello agreed that Lanzo had a safety plan for the project, which applied to the project. (Exhibit I, pp 11-12)

(f) This Lanzo safety plan required in Section 1.11:

> **HOUSEKEEPING/DAILY INSPECTIONS**
> 1.11 Work areas should be kept free of work materials, debris, obstructions and substances such as ice, grease or oil that could cause a surface to become slick or otherwise hazardous. ***The Superintendent or his authorized representative shall inspect the jobsite and all remote locations daily to insure walking and working surfaces are free of hazards.*** Other hazards and non-compliant issues shall be immediately abated as discovered daily. (Exhibit J, p 5, emphasis added)

(g) Contrary to Lanzo's brief on appeal that Wayne Steel was to inspect or report problems with the guardrail (p 6), Parinello agreed that this section from the Lanzo safety plan provided that work areas were to be kept free of work materials, debris and obstructions and that the ***superintendent*** [Parinello] ***was to inspect the job site daily*** to insure they were free of hazards. (Exhibit I, pp 13-14)

(h) If Agueros claimed that there was wood and thermalation in the accident area, then this debris would be from the ***Lanzo*** carpenters. (Exhibit I, pp 19-20)

(i) Parinello further agreed that if there was debris created by a subcontractor, the subcontractor had the responsibility to pick it up, but that a subcontractor would ***not*** have the responsibility to pick up another subcontractor's debris, and ***Wayne Steel would not have to pick up cut wood, plastic or thermalation, which would be the responsibility of other subcontractors.*** (Exhibit I, pp 29-31)

(j) Parinello agreed that if a subcontractor did not pick up its debris, it would be the responsibility of ***Lanzo*** to advise the subcontractor to pick it up, and if it was not done it would be the responsibility of ***Lanzo*** to pick the debris up itself:

> Q And if some sub doesn't pick their debris up, they leave it messy or whatever, then Lanzo's responsibility would be to go to them and say, hey, you didn't do what you're supposed to do. Go pick this stuff up.
> A Right.
> Q But if they didn't do that, in some cases Lanzo

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would have to pick it up?
A If it came to that, correct. (Exhibit I, pp 30-31)

(k) Contrary to Lanzo's brief (p 6) that the underlying plaintiff Agueros and Wayne Steel were responsible for the debris, Parinello repeated that Wayne Steel had ***no responsibility*** for the debris complained about by Agueros:

Q But as far as Wayne Steel goes, you don't have any information they were leaving debris around, do you?
A At that time, no. I wasn't there.
Q If there was cut wood, they wouldn't pick that up? That's not their responsibility?
A No.
Q And if there was pieces of boxes, that wouldn't be Wayne Steel's responsibility?
A True.
Q And if there was insulation laying around, that's not Wayne Steel's responsibility, is it?
A Correct. (Exhibit I, p 31)

(l) Parinello further admitted that there were other subs working on the same level as Wayne Steel at the time of the Agueros injury, which included the plumbers, and also the Lanzo laborers and Lanzo carpenters. (Exhibit I, p 19)

(m) Parinello admitted that the Lanzo Safety Plan [Exhibit J] included provision Section 1.14 that ***Lanzo was to insure compliance*** with MIOSHA:

1.14 Ensure compliance with MIOSHA, client-rules and all federal regulations. (Exhibit J, p 7; Exhibit I, p 15)

(n) Parinello further admitted that the Lanzo Safety Plan [Exhibit J] required that scaffolds more than 10 feet above the next level were required to have a handrail, mid-rail and toe boards on all open sides:

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1.5 All scaffolds above 10 feet or more in height must have handrail, mid-rail and toe boards installed on all open sides. (Exhibit J, p 22; Exhibit I, pp 15-16)

(o) Contrary to Lanzo's brief (p 6) that Wayne Steel had responsibilities regarding the guardrails, the guardrails on the project were all constructed by Lanzo carpenters and made out of wood. It was the responsibility of Lanzo to construct the guardrails:

Q Do you recall whether this third level had guardrails around it?
A Yes.
Q Do you recall what they were constructed out of?
A Wood.
Q And who constructed them?
A The carpenters.
Q The Lanzo carpenters?
A Yes.
Q ***So, this would have been Lanzo's responsibility to have constructed that guardrail?***
A ***Yes.*** (Exhibit I, p 18, emphasis added)

(p) Parinello further admitted that if a guardrail was weak and flimsy it would be Lanzo's responsibility to fix it:

Q If it was weak and flimsy and wasn't of adequate strength to comply with MIOSHA, that would be Lanzo's job to fix it?
A Correct. (Exhibit I, p 22)

(q) Lanzo received complaints regarding guardrails on the project and if there were such complaints Lanzo would be responsible to fix the guardrails:

Q You recall there being occasions when you got complaints about guardrails on that job?
A Yes.
Q Okay. When you got a complaint, it wold be Lanzo's responsibility to fix them?
A Correct. (Exhibit I, p 32)

(r) Contrary to Lanzo's brief (p 6) that Wayne Steel was responsible for the debris and guardrail, Parinello further agreed that the Detroit/Lanzo contract [Exhibit K] required in Section 4.13.2 that Lanzo was responsible to provide, erect, and maintain all necessary barricades. (Exhibit I, pp 23-24)

(s) Contrary to Lanzo's brief (p 6) that Wayne Steel was responsible for the debris and guardrail, Parinello further admitted that Section 7.2.2 of the Detroit/Lanzo contract [Exhibit K] required Lanzo to be ***solely*** responsible for initiating, maintaining and supervising all safety precautions and programs. (Exhibit I, pp 24-25)

3. **CZERAK DEPOSITION.**

In response to the court's discovery order, Lanzo advised that Joseph Czerak, was the person from Lanzo who had the most knowledge regarding Lanzo's claims against Wayne Steel and the contract documents, and Czerak was then deposed by Wayne Steel on 4/1/05 and testified:

(a) Although Czerak was identified by Lanzo as the individual with the most knowledge regarding the Lanzo claim against Wayne Steel, Czerak testified that he did not even start working for Lanzo ***until six months after*** the Agueros accident and that he had ***no*** knowledge or information regarding the guardrails, the debris or how the job was set up at the time of the accident. (Exhibit M, p 7, 9-10)

(b) Czerak had no information contrary to Parinello's testimony that Wayne Steel was the best sub Lanzo had on this job or any other job and did

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their work in a safe fashion. (Exhibit M, p 11)

(c) Czerak had no information regarding Wayne Steel's performance on the job, because Wayne Steel was almost done with its work when Czerak was hired. (Exhibit M, pp 11-12)

(d) Czerak agreed that if Lanzo had laborers and contractors working on any level of the project which was more than 10 feet above the next level, (which applies to where the accident occurred) Lanzo would be responsible to assure compliance with the guardrail safety provisions. (Exhibit M, pp 27-28)

(e) Czerak further agreed that if there were multiple subs working on the level along with Lanzo's carpenters and laborers, that Lanzo would have the responsibility to comply with these provisions regarding a safe guardrail system. (Exhibit M, pp 27-28)

(f) Regarding the contract documents and the claim by Lanzo against Wayne Steel, although Czerak was identified as the person with the most knowledge from Lanzo regarding the claim by Lanzo against Wayne Steel, Czerak testified that he had not reviewed the Lanzo/Wayne Steel subcontract until the morning of his deposition, that the provision he read was the indemnity provision, and that he had ***no opinions*** regarding the contract or the contract language. (Exhibit M, pp 13-15):

> Q Just so the record's clear. Sir, you have no opinions to give regarding the subcontract between Lanzo and Wayne Steel and the indemnity claim; is that correct?
> A Correct.

(g) Czerak further testified that he had not reviewed the City of Detroit/

Lanzo contract and had ***no opinions*** regarding any language whatsoever in this contract either. (Exhibit M, pp 28-31):

Q As I understand from Mr. Kudla's objection, you have no opinions regarding any of the provisions in this document as applied to the claim by Lanzo against Wayne Steel in this case; is that correct?
A Correct.

(h) Czerak further testified that the ***only*** documents in support of the claim by Lanzo against Wayne Steel were the Lanzo/Wayne Steel subcontract, and the transcript of the settlement hearing. (Exhibit M, pp 33-34)

4. WAYNE STEEL AFFIDAVITS.

Contrary to Lanzo's brief on appeal (p 6) that Wayne Steel had responsibilities regarding the debris and guardrail, Wayne Steel submitted affidavits from its foreman and superintendent that Wayne Steel had no responsibilities regarding the debris and guardrail, and that both conditions were the responsibility of Lanzo.

Armando Barcenas was the Wayne Steel foreman on the job. He provided an affidavit regarding the project which states:

(a) The general contractor ***Lanzo*** had the responsibility to clean up debris in the area where Agueros claimed he was injured.

(b) The general contractor ***Lanzo*** had the responsibility for the construction and maintenance of the guardrails in the area where Agueros claimed he was injured.

(c) ***Wayne Steel*** did ***not*** have ***any*** responsibility to construct or maintain the guardrails in the area where Fernando Agueros claimed he was injured. (See Barcenas' affidavit, attached as Exhibit R)

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Ken Mee was the Wayne Steel superintendent on the job and also provided an affidavit regarding the project which states:

(a) The general contractor ***Lanzo*** had the responsibility to clean up debris in the area where Fernando Agueros claims he was injured.

(b) The general contractor ***Lanzo*** had the responsibility for the construction and maintenance of the guardrails in the area where Fernando Agueros claims he was injured.

(c) ***Wayne Steel*** did ***not*** have ***any*** responsibility to construct or maintain guardrails in the area where Fernando Agueros claimed he was injured.

(d) Plumbers, electricians, laborers and carpenters were also working on the level where Agueros claimed he was injured. (See Mee affidavit attached as Exhibit S)

5. CONTRACT DOCUMENTS.

The contract documents produced by Lanzo in response to the court's discovery order included the City of Detroit/Lanzo contract. According to this contract, the City of Detroit contracted with Lanzo as the general contractor for the Leib Screening and Disinfection Facility Project. (See Exhibit K)

The contract General Conditions include Section 4.13.2 which states:

> The ***contractor*** shall provide, erect, paint and maintain all necessary barricades. . . . (Exhibit K, Section 4.13.2, emphasis added)

Section 7.2.2 provides:

> The ***contractor*** shall be ***solely*** responsible for initiating, maintaining and supervising all safety precautions and programs. The contractor shall take all necessary precautions for the safety of, and erect and maintain all necessary safeguards and provide

the necessary protection to prevent damage, injury or loss to:

(a) all employees on the Work and other persons who may be affected by the Work,

(b) all the Work and materials and equipment to be incorporated into the Work, with it stored on or off the site, and

(c) other property at or adjacent to the site, including trees, shrubs, lawns, walks, pavements, roadways, structures, utilities and underground utilities . . . (Exhibit K, Section 7.2.2, emphasis added)

Thus, pursuant to the contract language ***Lanzo*** as the ***contractor*** was ***solely*** responsible for initiating, maintaining and supervising all safety precautions including erecting and maintaining all necessary safeguards.

Lanzo bases its claim (See Lanzo complaint Exhibit L) in this case against Wayne Steel on the contractual indemnity language appearing in paragraph 9 of the Lanzo/Wayne Steel subcontract. (Copy attached as Exhibit N) This paragraph provides:

9. Indemnity. The Subcontractor further agrees: . . . . (2) The Subcontractor hereby assumes entire responsibility and liability for any and all damage or injury of any kind or nature whatever (including death resulting therefrom) be made or asserted whether or not such claims are based upon Lanzo alleged active or passive negligence or participation in the wrong or upon any alleged breach of any statutory duty or obligation on the part of Lanzo, the Subcontractor agrees to indemnify and save harmless Lanzo, its officers, agents, and employees from and against any and all such claims, and further from and against any and all loss, cost, expense, liability, damage or injury, including legal fees and disbursements that Lanzo, its officers, agents, or employees may directly or indirectly sustain, suffer or incur as a result thereof and the Subcontractor agrees to and does hereby assume, on behalf of Lanzo, its officers, agents or employees, the defense of any action at law or in equity which may be brought against Lanzo, its officers, agents or employees upon or by reason of such claims and to pay on behalf of Lanzo, its officers, agents and employees in any such action. (Exhibit N, pp 4-5)

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This language is set forth in very small print (see Exhibit N, pp 4-5) and this indemnity provision is comprised of 189 words, all in a single sentence, which violates just about every rule of grammar, sentence and paragraph construction. Most importantly, it does not state ***anywhere*** exactly what "claims" Wayne Steel is supposed to indemnify Lanzo for. It simply requires indemnity for "claims".

Lanzo's brief (p 2) in an attempt to bolster its contractual indemnity argument and the inadequacy of its contractual indemnity language, cites language from the Lanzo/Wayne Steel subcontract from the ***insurance*** paragraph, paragraph 8, by using ellipses to mislead the court into thinking the language dealt with contractual indemnity when it only dealt with insurance, which has ***nothing*** to do with this case. Paragraph 9 which was only ***partially*** quoted by Lanzo is ***entitled*** "Insurance" and states:

> 8. Insurance: The Subcontractor assumes responsibility for and liability in and for any and all damage or injury of any kind or nature whatever to all persons and to all property growing out of or resulting in the performance of the work set forth in this subcontract and shall provide and maintain insurance coverage of the types and with the limits set forth in Exhibit B attached hereto. Such coverage shall be maintained in form and with companies acceptable to Contractor, Engineer and Owner and shall, notwithstanding the requirements of Exhibit B, meet the applicable requirements imposed by the Agreement Between Owner and Contractor and any governmental authority having jurisdiction over the Work. Each policy of insurance shall name the Owner, the Engineer and the Contractor as additional insurers and shall provide for thirty (30) days notice of written cancellation to Contractor. Certificates evidencing such insurance shall be delivered to the Contractor prior to the commencement of the Work. . . . (Exhibit N, Lanzo/Wayne Steel subcontract, paragraph 8)

This paragraph has ***nothing*** to do with contractual indemnity or Lanzo's contractual indemnity claim which is set forth in paragraph 9 of the Lanzo/Wayne Steel subcontract.

6. CROSS-MOTIONS FOR SUMMARY DISPOSITION.

Lanzo and Wayne Steel then filed cross-motions for summary disposition on 3/3/05 and 4/15/05 respectively.

Lanzo's motion argued that it was entitled to contractual indemnity pursuant to the above-quoted indemnity provision and argued that Lanzo was not solely negligent because of the above-quoted statement by Agueros at the settlement conference that he "he ***may*** have been partially at fault" for the accident.

Wayne Steel argued in its motion that Lanzo's claim involved a construction contract which was governed by MCL 691.991, and that the testimony of the underlying plaintiff Agueros, the affidavits of the Wayne Steel foreman, Armando Barcenas, the Wayne Steel superintendent, Ken Mee, the testimony of the Lanzo job superintendent, Jack Parinello, and the Lanzo safety representative, Joseph Czerak, along with the contract documents, all established that the party with the ***sole*** responsibility regarding debris and the guardrails at the location of the accident was Lanzo, that Lanzo was solely negligent in causing the Agueros accident, that there was absolutely no testimony or evidence whatsoever of any negligence on the part of Agueros or Wayne Steel, that Lanzo's argument regarding the alleged "admission" by Agueros was meritless, because Agueros had ***only*** stated that he "***may have***" been partially at fault, which is speculation and conjecture at best, and this coerced "statement" made as part of a settlement agreement had no binding or collateral estoppel effect whatsoever on Wayne Steel, who was not a party to the case or the settlement agreement, and that Lanzo could not change the underlying facts or evidence or past history by coercing a statement from the underlying plaintiff as part of a settlement agreement.

Lanzo's response to Wayne Steel's motion for summary disposition ***admitted*** that

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Lanzo was responsible for installing and maintaining the guardrails:

> Further, Lanzo admits that it was responsible for installing and maintaining the railing. (Lanzo's response to Wayne Steel's motion for summary disposition, p 6)

Lanzo further argued that it was entitled to contractual indemnity, because the contractual indemnity language ***included*** its "***sole*** negligence":

> The indemnity language contained in the contract covers 'any and all' damage or injury of 'any kind or nature', ***including*** sole negligence. (Lanzo's response to Wayne Steel's motion for summary disposition, p 12, emphasis added)

The trial court, Judge Drain, heard oral argument on the cross-motions for summary disposition on 5/20/05 and ruled that Lanzo was solely negligent, that the underlying plaintiff never stated that he was negligent, that there were no facts to show that Agueros was negligent, and that Lanzo was solely negligent with regard to the guardrail and debris and thus denied Lanzo's motion for summary disposition and granted summary disposition to Wayne Steel. (Trial court opinion attached as Exhibit O, pp 11-12)

Judge Drain reviewed the deposition transcript of the underlying plaintiff Agueros which was filed with Wayne Steel's motion for summary disposition, and was the judge who approved the underlying Agueros/Lanzo settlement and was present at the time that Agueros testified at that hearing (Transcript attached as Exhibit F) and thus was aware of the testimony of Agueros and his statement at the settlement. Judge Drain stated as part of his opinion in granting Wayne Steel's summary disposition and denying Lanzo's that there were no "facts to show that he [Agueros] was contributorily negligent." (Transcript of oral argument summary disposition, Exhibit O, p 12)

The trial court's order granting Wayne Steel's motion for summary disposition and denying Lanzo's motion for summary disposition was entered on 6/6/05 (copy attached as

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Exhibit P).

7. LANZO'S MOTION FOR RECONSIDERATION.

Lanzo then filed a motion for reconsideration making the same argument it had made in its motion for summary disposition, that Agueros was negligent in causing the accident and thus Lanzo was entitled to summary disposition, or at least a finding that there was a genuine issue of fact for trial.

Wayne Steel responded that the rehearing was inappropriate under MCR 2.119(F)(3) because it raised the same issues already presented and ruled upon by the court, and that the evidence was clear that Lanzo was solely negligent in causing the Agueros injury.

The trial court agreed with Wayne Steel and denied Lanzo's motion for reconsideration by order of 7/6/05. (copy attached as Exhibit Q)

8. LANZO'S CLAIM OF APPEAL TO THE COURT OF APPEALS.

Lanzo then filed a claim of appeal to the Court of Appeals making the same arguments made in its current Application for Leave to Appeal to the Supreme Court. (See Lanzo's brief on appeal to the Court of Appeals which tracks along with the same arguments made in the brief in support of Application for Leave to Appeal)

Wayne Steel responded arguing that Lanzo's brief had misrepresented the underlying facts, that the underlying facts conclusively established that Lanzo was solely negligent, that Lanzo had failed to meet its burden under MCR 2.116(G)(4) and *Maiden v Rozwood*, 461 Mich 109, 118 (1999), in opposition to Wayne Steel's motion for summary disposition and failed to raise any issue of fact based upon any substantively admissible evidence as opposed to mere allegations and argument.

The Court of Appeals heard oral argument on 1/4/06 and issued its opinion on 1/26/06 (Copy attached as Exhibit T) affirming summary disposition in favor of Wayne Steel that there

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was no genuine issue of material fact, that Lanzo was solely negligent, that review of the transcript of the Agueros deposition and the transcript of the Agueros settlement did not establish any genuine issue of material fact, finding that an issue of fact cannot be created through contradiction of a prior sworn statement. (Exhibit T, p 4)

Lanzo then followed its typical procedure and filed a motion for reconsideration raising once again the arguments that it raised in its brief on appeal and which had been decided by the Court of Appeals and argued that the Court of Appeals had failed to address the issue of the alleged admission by Agueros that he was negligent which Lanzo claimed raised an issue of fact. (Lanzo's motion for reconsideration, pp 2-3) Wayne Steel responded that Lanzo's motion for reconsideration was once again inappropriate as failing to meet the standard of MCR 2.119(F)(3) because it raised the exact issues previously raised, argued and ruled upon and clearly ignored the Court of Appeals decision which specifically stated that the court had reviewed the transcript of the Agueros deposition testimony along with the transcript of the settlement agreement to determine that there had been no issue of fact raised.

The Court of Appeals denied the motion for reconsideration by order of 3/16/06. (Copy attached as Exhibit U)

9. LANZO'S APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT.

Lanzo has now filed its Application for Leave to Appeal to the Supreme Court arguing that the Court of Appeals decision failed to consider whether there was an issue of fact as to Agueros' negligence which would mean that Lanzo was not solely negligent. (Lanzo's brief, pp 9-11)

Lanzo completely misrepresents the basis of the Court of Appeals decision, arguing that the Court of Appeals simply referred to the underlying plaintiff Agueros' pleadings and

failed to review the underlying plaintiff Agueros' deposition testimony. This is the same misleading argument which Lanzo made in its motion for reconsideration in the trial court and in the Court of Appeals, and which both courts rejected. The trial court was familiar with the underlying facts including the dep testimony of Agueros and his testimony at the settlement and rejected Lanzo's argument. Similarly, contrary to Lanzo's argument, the Court of Appeals directly addressed Lanzo's argument, and specifically stated:

> In support of its motion for summary disposition, plaintiff also attached the transcript from the settlement hearing in the underlying case in which the underlying plaintiff admitted that he may have been partially at fault for the accident. We find that this transcript does not establish a genuine issue of material issue of fact because it was motivated by the underlying plaintiff's desire to reach a settlement with plaintiff in that case and ***because it specifically contradicts his deposition testimony that plaintiff was the only liable party.*** An issue of fact cannot be created through contradiction of prior sworn statements. (Exhibit T, p 4, emphasis added)

The Court of Appeals specifically ***considered*** and ***rejected*** Lanzo's argument that there was an issue of fact whether Agueros was negligent.

Lanzo makes a similarly disingenuous argument that the Court of Appeals decision in *Papalas v Metro Piping*, unpublished per curiam decision of the Michigan Court of Appeals, docket number 252470 (2005), was correctly decided, while the current case was not. (Lanzo's brief in support of Application for Leave to Appeal, pp x, 17) The *Papalas* decision was issued by two of the same panel members who sat in the current case, Judges Borrello and Donofrio, less than two months before hearing oral argument in the current case. The *Papalas* decision was argued at length by Lanzo at oral argument, and distinguished by Wayne Steel. As will be pointed out hereafter, the decision in *Papalas* is in complete accord with the decision in the current case.

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It is well-settled that an issue of fact cannot be raised by argument, but only by substantively admissible evidence, and not by a coerced statement as part of a settlement which is directly contrary to prior deposition testimony.

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STANDARD OF REVIEW

The defendant-appellant Wayne Steel agrees that the appellate standard is a de novo review. However, the standard for granting Application for Leave to Appeal is different.

The appellant must show one of the grounds pursuant to MCR 7.302(B).

The only ground raised by Lanzo (Lanzo's brief, pp ix-xi) appears to be 7.302(B)(3), an issue that involves legal principles of major significance to the state's jurisprudence.

As indicated previously in this brief, Lanzo has not raised any issue involving legal principles of major significance of the state's jurisprudence.

Contrary to Lanzo's brief, there is no dispute or inconsistency among Michigan appellate decisions regarding the rules to be applied to interpret and enforce contractual indemnity agreements.

More importantly, Lanzo has failed to cite a single case involving any confusion regarding the enforcement of MCL 691.991. Lanzo makes the statement that the Michigan Court of Appeals has "increasingly shown" a "disregard" for an indemnitee's right to have its alleged negligence determined by a jury, without citing a single case in support of this statement.

Lanzo's further argument that it is "impossible" for businesses or insurers to predict or assess litigation risks regarding indemnity agreements is similarly baseless. Lanzo refers to a "chaos of disparate case law" without citing any, because there is none.

The law in Michigan is clear that a contractor in a construction setting cannot obtain contractual indemnity for its sole negligence. Despite Lanzo's arguments, it is clear, based on the testimony of its own employees, that it was solely negligent and is thus barred from contractual indemnity. The Application for Leave to Appeal should be denied.

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ARGUMENT

I. STANDARD OF REVIEW FOR GRANTING A MOTION FOR SUMMARY DISPOSITION.

MCR 2.116(G)(4) requires:

> (4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

In *Maiden v Rozwood*, 461 Mich 109 (1999), the Supreme Court discussed this standard and held that under MCR 2.116(C)(10), in evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion, but where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. The court further held that to clarify the correct legal standard due to inconsistent application of the standard since 1985:

> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ standards citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.

Applying this standard, Lanzo has failed to raise any genuine issue of material fact other than its own arguments.

II. A PARTY IS BOUND BY HIS/HER DEPOSITION TESTIMONY AND MAY NOT RAISE AN ISSUE OF FACT THROUGH CONTRADICTION OF PRIOR

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SWORN STATEMENTS

The Michigan appellate courts have repeatedly held that a party is bound by his/her deposition testimony. *State Farm Fire & Cas Co v Moss*, 182 Mich App 559, 562; 452 NW2d 816 (1989) ("It is well-settled that a party's deposition testimony is binding on the party"); *MacDonald v Barbarotto*, 161 Mich App 542, 548; 411 NW2d 747 (1987) ("Plaintiff is bound by his deposition testimony"); *McGhee v GMC Truck & Coach Division, General Motors Corp.*, 98 Mich App 495, 504; 296 NW2d 286 (1980)("The plaintiff's testimony is binding on him"); *Northern v Fedrigo*, 115 Mich App 239, 246 (1982) ("Plaintiff is bound by the statements in his deposition. . .Under these circumstances, additional discovery would be futile."); *Gamet v Jenks*, 38 Mich App 719, 726 (1972) ("As a result of his own deposition testimony, plaintiff's ability to present a case was challenged. . . .when a party makes statements of fact in a "clear, intelligent, unequivocal" manner, they should be considered as conclusively binding against him in the absence of any explanation or modification, or of a showing of mistake or improvidence."); *Longley v BCBSM*, 136 Mich App 336, 339 (1984) ("The trial court found that, as a matter of law, plaintiff's admission at her deposition precluded her from claiming that she had a legitimate expectation of discharge only for good cause and that, in light of plaintiff's admission, further discovery would be of no avail to plaintiff."); *Held Construction v Michigan National Bank*, 124 Mich App 472, 476 (1983) ("We conclude that summary judgment was properly granted. Plaintiffs' own depositional statements, which are binding upon them for purposes of determining whether summary judgment would be appropriate. . . revealed that no genuine issue of fact existed such as would preclude dismissal of those counts seeking damages in excess of the monetary value of the contract."); *Stefan v White*, 76 Mich App 654, 660 (1977) ("Plaintiff's testimony which

negated a causal relationship between her fall and defendant's premises, therefore, could be treated as binding upon plaintiff by the trial court. Plaintiff's husband's affidavit does not improve her position.")

The Michigan appellate courts have further held that a party may not attempt to raise an issue of fact by contradiction of prior sworn statements. *Barlow v Crane-Houdaille, Inc.*, 191 Mich App 244, 249-50 (1991) ("Faced with the inconsistencies between Barlow's deposition testimony and his later affidavit, the court granted Grace's motion relying on the holding in *Gamet v Jenks*, 38 Mich App 719; 197 NW2d 160 (1972). . . .Barlow testified at deposition that the only Grace product to which he was exposed was a dry masonry filler called Zonolite. . . .Barlow then responded, through an affidavit, that he had been exposed to a spray-on product manufactured by Grace that contained asbestos. This was insufficient to raise an issue of fact. Barlow was bound by his deposition testimony. The trial court did not err in granting Grace's motion."); *Schultz v Auto-Owners Insurance*, 212 Mich App 199, 202 (1995) ("Lastly, plaintiff asserts a material of fact existed and should have been left for the trier of fact. The affidavit which plaintiff submitted to contradict deposition testimony could not be a use to establish a genuine issue of material fact."); *Progressive v R & R Haulers*, 243 Mich App 404, 411 (2000) ("Therefore, inasmuch as a party may not create issues of fact through contradiction of that party's prior sworn statements, we reject plaintiff's contention in this regard.")

As will be pointed out hereafter, Lanzo seeks to ignore these rules. Lanzo seeks to change the underlying facts and the testimony of the underlying plaintiff Agueros by coercing a statement from Agueros as part of Lanzo's settlement with Agueros that Agueros "may have been partially at fault for this accident". (Exhibit F, p 6) This speculative, coerced statement

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cannot change the underlying facts, or Agueros testimony, and more importantly, has no binding effect whatsoever.

III. GENERAL RULES OF CONTRACTUAL INDEMNITY AND ENFORCEMENT OF MCL 691.991.

Contrary to Lanzo's brief, the rules regarding enforcement of contractual indemnity agreements are well-settled:

1. A right to indemnification can arise from an express contract in which one of the party's has clearly agreed to indemnify the other. *Hubbell, Roth & Clark v J. D. Contractors*, 249 Mich App 288, 291 (2002).

2. Indemnity contracts, like other contracts, are to be construed in order to give effect to the intentions of the parties. *Hubbell, Roth & Clark v J. D. Contractors*, *supra* at 291; *Sherman v DeMaria Building Co.*, 203 Mich App 593, 596 (1994); *Pritts v J. I. Case*, 108 Mich App 22, 29 (1981).

3. Indemnity contracts are construed against the party who is seeking indemnity, which in this case is Lanzo. *Pritts v J. I. Case Co., supra* at 29; *Sherman v DeMaria Building Co., supra* at 596; *Gartside v YMCA*, 87 Mich App 335, 339 (1978); *Fischbach-Natkin v PPP, Inc.*, 187 Mich App 448, 452 (1987).

4. Indemnity contracts are also construed against the party who drafted the agreement, which in this case is Lanzo. *Pritts v J. I. Case Co., supra* at 29; *Gartside v YMCA, supra* at 339; *Sherman v DeMaria Building Co., supra* at 596.

5. In ascertaining the intentions of the parties, the courts will consider the language of the contract as well as the situation of the parties and the

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surrounding circumstances. *VandenBosch v Consumers Power*, 394 Mich 428 (1975); *Pritts v J. I. Case Co., supra* at 29; *Sherman v DeMaria Building Co., supra* at 596; *Chrysler v Brencal*, 146 Mich App 766, 771 (1985).

6. MCL 691.991 provides that an indemnity agreement in a construction setting is ***void*** and ***unenforceable*** if it seeks to obtain contractual indemnity for the indemnitee's ***sole*** negligence:

> Sec. 1. A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

The Michigan appellate courts have repeatedly strictly enforced MCL 691.991 to void any contractual indemnity claim which seeks to impose indemnity for the indemnitee's sole negligence. *Peeples v Detroit*, 99 Mich App 285 (1980):

> In the building and construction industry, public policy, as expressed by MCL 691.991; MSA 26.1146(1), prohibits an indemnitee from recovering for his sole negligence.

Similarly, in *Sentry Insurance v National Seal*, 147 Mich App 214 (1985), the Court of Appeals held that MCL 691.991 provides that an indemnitee cannot obtain contractual indemnity for its sole negligence, and thus the indemnitor cannot be liable unless the indemnitor is also negligent:

> Thus, an indemnitor is not liable for the indemnitee's negligence, unless the indemnitor is also negligent, regardless of contractual language to the contrary. 147 Mich App at 219.

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Similarly, in *Darin & Armstrong v Ben Agree Co.*, 88 Mich App 128 (1979), the Court of Appeals affirmed summary disposition in favor of the subcontractor against the general contractor's claim for contractual indemnity holding:

> Even if the contractual provision could be read, in light of surrounding circumstances, as indemnifying Darin & Armstrong against its own negligence, the provision would be void as against public policy. MCL 691.991; MSA 26.1146(1); *Ford v Clark Equipment Co.*, 87 Mich App 270, 274 NW2d 33 (1978).

See also: *Parliament Construction Co. v Beer Precast Concrete*, 114 Mich App 607 (1982).

Lanzo's brief argues that "defendant trotted out a completely discredited theory that it could not be contractually responsible to hold Lanzo harmless because Agueros' sued only Lanzo for negligence." (Lanzo's brief, p 14) Lanzo then attacks the so-called "old line" of cases in Michigan which held that a party could not be indemnified for its own negligence, unless this intent was expressed in unequivocal terms. First, and most importantly, Wayne Steel ***never*** made this argument. Wayne Steel, rather, has argued in the trial court and in the Court of Appeals that ***all*** of the underlying ***evidence*** (not ***argument*** as Lanzo claims) agrees that Lanzo was ***solely*** negligent. Further, it was this attorney's own case, *Pritts v J. I. Case*, 108 Mich App 22 (1981), which first held that the "old line of cases", which Lanzo attacks, were incorrectly decided.

Lanzo's brief (pp 15-16) next admits that MCL 691.991 forbids parties from obtaining indemnity for their sole negligence in building and construction industry cases. However, Lanzo argues (brief, p 16) that Wayne Steel's position is that the issue of whether there was another negligent party may only be determined from looking at the underlying plaintiff's complaint. As with Lanzo's prior arguments, Wayne Steel ***never*** made this argument either.

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Wayne Steel's only argument has been that the undisputed ***evidence*** established that Lanzo was solely negligent.

Lanzo next cites *Fischbach-Natkin v PPP, Inc.*, 157 Mich App 448 (1997) and *Sherman v DeMaria, supra*; *Papalas v Metro Piping*, unpublished per curiam decision of the Michigan Court of Appeals docket number 252470 (2005) and *Turner Construction v Robert Carter Corp.*, 162 F3d 1162 (6th Cir, 1998) (Lanzo's brief, p 16) for the proposition that Lanzo was not solely negligent. In *Fischbach-Natkin*, the jury determined that the underlying plaintiff was 25% negligent, the co-defendant LaSalle Machine Tool was 25% negligent and Fischbach-Natkin was 50% negligent, and thus Fischbach-Natkin could not be solely negligent. 157 Mich App at 451. In *Sherman v DeMaria, supra* the court found that there were claims against multiple defendants and no claim that DeMaria was solely negligent. 203 Mich App at 601-2. In *Turner Construction v Carter, supra* the Sixth Circuit held that the claims by the underlying plaintiff against Turner were only for Turner's negligence and did not give rise to any duty of the subcontractor to provide contractual indemnity and held that Turner's argument, similar to Lanzo's argument in the current case, was directly contrary to Michigan public policy and the statutory prohibition against indemnity contracts for a contractor's sole negligence:

> With comparative fault and zealous advocacy, it does not seem farfetched to think that nearly any case could generate at least a wisp of negligence by a plaintiff. This would accomplish by chance what a Michigan public policy expressly prohibits - the unconscionable practice of coercing subcontractors into becoming insureds exposed to nearly unlimited liability.
>
> Although Turner urges Fulan's alleged negligence gives rise to Carter's duty to indemnify, the fact remains that Turner was sued for its own negligence.

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Lanzo initially argued that the Court of Appeals decision in *Papalas v Ford Motor, supra* should control the result in the current case (Lanzo's brief, p x) but then later in its brief (p 17) claimed that the decision in *Papalas* was erroneous. As stated previously in this brief, the Court of Appeals panel in Lanzo consisted of two of the same judges who decided the current case, Judges Donofrio and Borrello, who issued their decision in *Papalas* less than two months before hearing oral argument in the current case. Lanzo first raised the *Papalas* case at oral argument, because it had not been decided when Lanzo filed its brief on appeal. At that time Wayne Steel argued, as it argues now, that the underlying facts in *Papalas* are completely distinguishable from the current case. The underlying plaintiff in *Papalas* was a painter employed by Metro Industrial Painting, who in turn was contracted by Commercial Contracting Company, the general contractor for Ford Motor Company, to renovate Ford's Dearborn Engine and Fuel Tank Plant. There was a power failure and all lighting was extinguished in the G Building where the plaintiff and his co-workers were working and in a neighboring building, the Swarf Building. When the power did not come back on, the plaintiff and his co-workers ceased working and decided to leave the work site and proceeded to walk through the adjacent Swarf Building, which was "pitch black". As they were walking along, plaintiff stepped on a piece of plywood covering a floor opening, which gave way and he fell sustaining injuries. The record disclosed that Walbridge Aldinger, a general contractor responsible for work in the Swarf Building, had covered eight floor openings in the floor of the Swarf Building but that prior to the plaintiff's accident someone had removed the plywood covers.

Discovery established that a subcontractor of Walbridge Aldinger, Metro Industrial Piping, had removed the cover over the accident hole and had advised Walbridge Aldinger of this, but the cover had not been replaced prior to the plaintiff's accident. The Court of

Appeals held that based on these facts, Ford could seek contractual indemnity from Metro Industrial Painting and that Ford was not solely negligent. There were allegations that Ford, Walbridge Aldinger, Commercial Contracting Company, Rouge Steel Company, Detroit Edison and Metro Industrial Piping were all negligent. There were obvious questions of fact regarding the negligence of these and other parties. This is in no way similar to the facts in the current case where the undisputed evidence established that the only party who had responsibility regarding the alleged unsafe conditions, the guardrail and debris, was Lanzo.

IV. CONTRARY TO LANZO'S BRIEF THERE WERE NO MATERIAL ISSUES OF FACT.

Lanzo argues (pp 17-18) next that the "facts" of Agueros' negligence were well documented. The only issue of Agueros' negligence is Lanzo's ***argument*** without any supporting facts or evidence. Lanzo's argument is a complete misrepresentation of the underlying facts and evidence.

The deposition testimony, affidavits and contract documents summarized in the Counter-Statement of Facts of this brief all agree that the factors causing the Agueros injury were the debris he had to step through and the inadequate guardrail. All of the witnesses including Agueros, Parinello (the Lanzo superintendent), the affidavits of the Wayne Steel foreman Barcenas and superintendent Mee, and the contract documents all agreed that Wayne Steel had absolutely no responsibility for the debris or guardrail and that Lanzo was the party ***solely*** responsible for the debris and guardrail. The contract specifically states:

> The contractor [Lanzo] shall be ***solely*** responsible for initiating, maintaining and supervising all safety precautions and programs. The contractor shall ***all*** necessary precautions for the safety of, and erect and maintain ***all*** necessary safeguards and provide the necessary protection to prevent damage, injury or loss to:
>
> (a) All employees on the Work and other persons who may

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be affected by the Work . . . (Exhibit K, Section 7.2.2, emphasis added)

The Lanzo Safety Plan requires:

> 1.11 Work areas should be kept free of work materials, debris, obstructions and substances . . . .The Superintendent or his authorized representative shall inspect the job site and all remote locations ***daily*** to ***insure*** walking and working surfaces are ***free of hazards***. Other hazards and non-compliant issues shall be immediately abated as discovered daily. (Exhibit J, p 5, emphasis added)

Lanzo argues (pp 4-6) that Agueros knew the guardrail was weak and reported this fact to his supervisor, who did not report it to Lanzo. Regardless of whether Agueros or his foreman, Barcenas, knew that the guardrail was weak, the ***only*** party who had any responsibility to inspect and maintain the guardrail was Lanzo, and Wayne Steel had ***no*** responsibility in this regard, including based on the testimony of Lanzo's own superintendent, Parinello. (Counter-Statement of Facts, pp 9-14) Contrary to Lanzo's brief (p 5, n 27) that Agueros contributed to the debris in the area, Agueros did not contribute to ***any*** of the debris in the area. He testified that none of the debris at the scene was from Wayne Steel. (Exhibit E, p 49) Contrary to Lanzo's brief (p 5, n 27) that Agueros stated that the debris had nothing to do with his fall (Lanzo's brief, p 5, note 27), Agueros testified that the debris forced him to take a circuitous path which took him near the columns and the rail, that he was trying to avoid the debris at the time of the incident, and the debris should not have been there. (Exhibit E, pp 65, 85-91) Contrary to Lanzo's brief (pp 4-5) that Agueros chose his own path and was carrying the re-rod "a mere two inches" from the guardrail when he tripped and fell, Agueros testified that he was four to five feet from the guardrail, and when the end of the re-rod contacted a column, he was already off balance from stepping over the debris. (Exhibit E, pp 86-89) Contrary to Lanzo's brief that Agueros caused his own injury when he

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"miscalculated" how much room he had to carry the rebar (Lanzo's brief, pp 4-5), Agueros testified that he was carrying four to six, eight to ten foot long rebar, weighing 60 to 80 pounds on his right shoulder and the injury was caused by having to take a difficult path stepping through debris which brought him near the column and the guardrail and he was attempting to avoid the guardrail and debris when the end of the rebar contacted the column. (Exhibit E, pp 56-59, 81-89) Contrary to Lanzo's brief (p 6) that Wayne Steel was responsible for the guardrail, debris and unsafe working conditions, Wayne Steel's superintendent and foreman submitted affidavits that Wayne Steel had no responsibility regarding the debris and guardrail (Exhibits R and S), Lanzo's superintendent, Parinello, testified that Wayne Steel was the ***best*** subcontractor Lanzo had on this job or any other job and he had absolutely no safety concerns or problems with Wayne Steel whatsoever and Wayne Steel had no responsibility for the debris or the guardrail which was the responsibility of the Lanzo. (Counter-Statement of Facts pp 9-14); according to the contract documents, Lanzo was ***solely*** responsible for safety precautions including all necessary safeguards and pursuant to its safety plan Lanzo was responsible to inspect the work site daily to assure it was free from all debris and to insure compliance with MIOSHA. (Counter-Statement of Facts, pp 10-11, 17-18). The trial court, after reviewing the Agueros dep transcript and having heard oral argument, agreed that there were no ***facts*** to show that Agueros was negligent. (Exhibit O, pp 11-12) The entire purpose of having a debris-free work surface and an appropriate guardrail is to avoid occurrences just like the Agueros accident. The undisputed evidence based on the testimony of Agueros, Parinello, Czerak, and the Affidavit of Mee, establishes that the accident area was a common work area, where multiple trade were working, and for which Lanzo, the general contractor, would have safety responsibility. *Ormsby v Capital Welding,* 471 Mich 45 (2004). There are no ***facts*** to establish ***any*** negligence by Agueros or

Wayne Steel.

None of the case cited by Lanzo support its position on this issue. These cases deal with different factual scenarios and legal theories, none of them involve underlying facts even remotely similar to those in the current case, and do not concern the issue that the sole negligence of the general contractor prevents the general contractor from obtaining contractual indemnity. The cited cases (Lanzo's brief, pp 18-21) include a premises liability claim where the plaintiff kicked a stuck door and fell down the stairs (*Miller v Miller*, 373 Mich 519 (1964)), whether a warning tag on a 55 gallon drum of paint thinner contained an adequate warning (*Simonetti v Rinshed-Mason*, 41 Mich App 446 (1972)); whether violation of a MIOSHA standard could be considered evidence of negligence (*Zalut v Andersen*, 186 Mich App 229 (1990)); whether a plaintiff's decedent's intoxication was admissible in an auto accident/dram shop claim (*Rodriguez v Solar of Michigan*, 191 Mich App 483 (1991)); whether working under a front-end loader's bucket presented an open and obvious danger (*Laier v Kitchen*, 266 Mich App 482 (2005)); whether plaintiff was negligent for contributing to the intoxication of the defendant (*Poch v Anderson*, 229 Mich App 40 (1998)); whether plaintiff should have seen a puddle and water dripping before she fell (*Charleston v Meijer*, 124 Mich App 416 (1983)); whether plaintiff was negligent for walking too quickly while limping before slipping on a tile floor (*Duke v American Olean Tile*, 155 Mich App 555 (1986)); whether plaintiff was comparatively negligent for attempting to walk down a forty-five degree hill in the dark (*Ferguson v Delaware International Speedway*, 164 Mich App 283 (1987)); whether plaintiff was comparatively negligent when she saw salt on the sidewalk, which she knew meant there could be a hazardous condition, yet failed to watch where she was stepping (*Bender v Farmington Ridge*, unpublished per curiam decision of the Michigan Court of Appeals docket number 208545 (2000).

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Lanzo also miscites contractual indemnity cases. In *Ford v Clark*, 87 Mich App 270 (1987) (Lanzo's brief, p 21), there was evidence of negligence on the part of the indemnitor's employees who left a rope dangling down from their platform where it was contacted by a passing hi-lo. In *Lindsey v Detroit*, unpublished per curiam decision of the Michigan Court of Appeals docket number 183512 (1997) (Lanzo's brief, pp 21-22), the issue was whether the underlying plaintiff's claim arose out of or resulted from the performance of his employer's work under the subcontract. In *Department of Social Services v Aetna*, 177 Mich App 440 (1989) (Lanzo's brief, pp 22-23), the court held that there was no proof of any negligence on the part of the indemnitee/ DSS, let alone that DSS was ***solely*** negligent. 177 Mich App at 445-46. Clearly, none of these cases offer any support for Lanzo's arguments.

V. LANZO TOTALLY MISSTATES ITS BURDEN OF PROOF.

In order to avoid the facts and evidence which bar Lanzo's contractual indemnity claim, Lanzo attempts to create its own burden of proof, which it claims is a "piece of cake to prove", and further argues that Wayne Steel has a "huge burden", which it cannot satisfy. (Lanzo's brief, pp 24-26) Unfortunately for Lanzo, as with all of its other arguments, it is totally wrong on both the law and the facts.

Lanzo's argument confuses and convolutes who has the burden of proof in an indemnity action and what this burden of proof is. Further, Lanzo argues about its "potential" liability to the plaintiff, when this was not the issue in the trial court or on this appeal. Lanzo repeatedly argues that it is entitled to favored treatment, because settlements are encouraged and Wayne Steel supposedly failed to participate in the underlying case. While settlements are to be encouraged, the courts have set forth specific rules to avoid infringing on the rights of non-parties to the settlement. Further, Lanzo is the party who chose not to third party Wayne Steel into the underlying Agueros case and chose not to even advise Wayne Steel of the

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underlying Agueros case until it had been pending for two years. As indicated by the undisputed facts and evidence, Wayne Steel had no obligation to indemnify or defend Lanzo in the Agueros case.

A. BURDEN OF PROOF FOR A PARTY SEEKING CONTRACTUAL INDEMNITY FOLLOWING A SETTLEMENT

The burden of proof for a party seeking contractual indemnity following a settlement is a two-step process which first requires the indemnitee to establish that there is an enforceable indemnity contract and that the underlying claim fits the terms of the indemnity contract, and second to establish the indemnitee's liability to the underlying plaintiff.

Lanzo's brief on appeal convolutes this burden and argues that Lanzo only has to show its "potential" liability to the plaintiff and that it is Wayne Steel's burden to show that Lanzo does not have potential liability to the plaintiff. Lanzo's bizarre argument eliminates the first requisite, to first establish that it has a valid and enforceable indemnity contract which covers the underlying factual scenario.

Every appellate case dealing with this issue has always held that the first requisite is to establish the right to indemnity. In *St. Luke's Hospital v Giertz*, 458 Mich 448 (1998), the court held that in any indemnity claim, whether common law or contractual following an underlying settlement, the indemnitee must first prove its right to indemnity. In the *St. Luke's* case, the hospital failed to establish whether its liability to the underlying plaintiff was active or passive, which the court held thus barred any attempt to obtain indemnity from the alleged tortfeasor/indemnitor.

In *Ford v Clark Equipment*, 87 Mich App 270 (1978), the Court of Appeals discussed the burden of proof holding:

> The present discussion must be limited in application, of course, to cases of the type involved here, that is, ***an enforceable***

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> ***contract of indemnity exists***, a seasonable tender of defense with notice that a settlement will be entered is made and the tender of defense is refused.
>
> ***To recover under these circumstances the indemnitee must show that the fact situation of the original claim is covered by the contract of indemnity*** and that the settlement is reasonable. 87 Mich App at 277-278, emphasis added.

Similarly, in *Grand Trunk v Auto Warehousing*, 262 Mich App 345 (2004), the case miscited by Lanzo, the court clearly held that the burden of proof for a contractual indemnity claim following a settlement was on the party seeking the contractual indemnity and that the burden required the party seeking the contractual indemnity ***to prove*** an enforceable contract of indemnity which applies to the underlying claim:

> ***The threshold question, whether the fact situation is covered by the indemnity contract***, generally requires only a straight-forward analysis of the facts and the contract terms.
>
> Under the terms of the parties' lease in this case, it is clear that the fact situation of the original claim is covered under the indemnity contract. 262 Mich App at 356-57, emphasis added.

Similarly, in *Parliament Company v Westwood Carpentry Co.*, unpublished per curiam decision of the Michigan Court of Appeals docket number 137969 (1995), the Court of Appeals held:

> To recover on a contract in indemnity, an indemnitee must establish that (1) ***an enforceable contract of indemnity exists***, (2) a seasonable tender of defense with notice that a settlement would be entered is made, and (3) the tender of defense is refused. [citations omitted] In addition, the indemnitee must ***also show that the original claim is covered by the contract of indemnity*** and that the settlement is reasonable. (emphasis added)

Similarly, in *Consolidated Rail Corp. v Ford Motor Company*, 751 F Supp 764 (E.D. Mich, 1990), the court held:

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> . . .an indemnitee who settles a claim against it before liability has been determined, need only show potential liability in order to require the indemnitor to indemnify him for the settlement that has been paid out. This rule is used where: (1) ***an enforceable contract of indemnity exists between the indemnitor and indemnitee***, (2) a seasonable tender of defense to the claim along with notice that a settlement will be entered is made by the indemnitee to the indemnitor, and (3) the indemnitor refuses the tender of defense . . . .If these requirements are met ***the indemnitee must further show: (1) that the fact situation of the original claim was covered by the contract of indemnity, and*** (2) that the settlement was reasonable. 751 F Supp at 676, emphasis added.

As applied to this case, Wayne Steel's motion for summary disposition argued that Lanzo could not seek or obtain contractual indemnity from Wayne Steel, because Lanzo failed to meet the first requisite of its burden of proof, to establish that a valid contract of indemnity existed which covered the fact situation of the underlying claim. Wayne Steel argued that the undisputed facts and evidence established that Lanzo was solely negligent in regard to the Agueros claim which thus barred its contractual indemnity claim pursuant to MCR 691.991.

Lanzo makes the argument that Wayne Steel has thus established Lanzo's liability to the primary plaintiff Agueros. This is ***not*** the issue. The issue is that Lanzo's contractual indemnity claim is barred by its sole negligence to the underlying plaintiff Agueros. Further, even accepting Lanzo's argument that Wayne Steel has the burden of proving that Lanzo was ***solely*** negligent, Wayne Steel has clearly met this burden as indicated by the undisputed facts, including the admissions of Lanzo's own superintendent and safety director, that Lanzo was solely responsible for the debris and guardrail and that there is no evidence of any negligence on the part of Wayne Steel, the underlying plaintiff or anyone other than Lanzo.

B. LANZO'S ARGUMENT REGARDING ITS "POTENTIAL" LIABILITY IS CONFUSED AND IRRELEVANT.

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As indicated in the preceding section of this brief, Lanzo argues that it only has to carry the "piece of cake" burden to show its "potential" liability to the underlying plaintiff. (Lanzo's brief, pp 24-25) If Lanzo's argument was the law, then any party could obtain indemnity from anyone it wanted to by simply claiming it was potentially liable to a plaintiff. Obviously, this is illogical and not the law, and misses the all-important first burden of proving an enforceable contract of indemnity ***which applies*** to the factual setting, as discussed in the prior section of this brief.

What is further interesting about Lanzo's argument on appeal regarding its "potential" liability to the underlying plaintiff, is that it ***never*** raised any such argument in the trial court. Wayne Steel argued in its motion for summary disposition and at oral argument (Exhibit O, p 6) that Lanzo's burden was to prove its right to indemnity ***and*** its liability to the underlying plaintiff.

Lanzo made no argument regarding its burden of proof or Wayne Steel's burden of proof in any of its briefs in the trial court or at oral argument in the trial court and only argued that it was entitled to contractual indemnity.

The reason Lanzo made no such argument is either it did not understand what its burden of proof was, or, more likely, it did not want to argue about its "actual" or "potential" liability to the plaintiff, because it knew any such argument would establish its sole negligence barring its contractual indemnity claim.

First, Lanzo is barred from raising its arguments regarding its "potential" or "actual" liability to the primary plaintiff on appeal by failing to raise any such argument in the trial court. *Environair, Inc. v Steelcase*, 190 Mich App 289, 295-96 (1991); *Dwyer, Inc. v Jaguar Cars, Inc.*, 167 Mich App 672, 685-86 (1988); *Adam v Sylvan Glynn,* 197 Mich App 95, 98 (1992).

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cases dealing with this issue in *Ford v Clark*, *supra* at 277, *Grand Trunk Railroad v Auto Warehousing, supra* at 355, *Parliament Company v Westwood Carpentry, supra* at 1-2, *Pritts v J. I. Case Co.*, 108 Mich App 22, 32-34 (1981); and *Consolidated Rail v Ford Motor Company, supra* at 676.

In the current case, the record is clear that Lanzo ***never*** tendered the settlement amount to Wayne Steel or advised Wayne Steel that if Wayne Steel did not take over the defense of Lanzo in the underlying case, Lanzo was going to settle with the underlying plaintiff for this amount and then proceed against Wayne Steel for contractual indemnity. Thus, ***if Lanzo had an enforceable indemnity contract against Wayne Steel and Lanzo was not solely negligent,*** then Lanzo's additional burden would be to prove its actual liability to the underlying plaintiff. However, as indicated previously, this is ***not*** an issue on this appeal, because Wayne Steel has established that Lanzo was solely negligent which thus bars its contractual indemnity claim.

VI. CONTRARY TO LANZO'S ARGUMENT, THE UNDERLYING PLAINTIFF'S STATEMENT AS PART OF A SETTLEMENT DOES NOT CREATE EVIDENCE OF NEGLIGENCE.

Lanzo argues that the statement by Agueros at the time of the settlement is a "judicial admission" which establishes negligence by Agueros and Lanzo's right to contractual indemnity. (Lanzo's brief, pp 30-33)

First, Agueros made no "admission", he was asked if he "may have been partially at fault for this accident" and responded in the affirmative. This question and answer establishes nothing. The question was not whether he was actually at fault or how he was actually at fault. That a party "may have" done or not done something establishes nothing. It is nothing more than pure conjecture and speculation and thus insufficient as a matter of law as held by the Michigan appellate courts in numerous cases: *Skinner v Square D Company*, 445 Mich

153, 170-173 (1994) (". . .Causation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment."); *Glinski v Szylling*, 358 Mich 182, 201-2 (1999) ("A case cannot go to a jury supported merely by sheer speculation that something might have been a cause, or, going one step further, that there was a possibility that something was the cause."); *Kaminski v Grand Trunk*, 347 Mich 417, 422 (1956); *Hall v Consolidated Rail Corp.*, 452 Mich 179 (2000); *Jubenville v West End Cartage*, 163 Mich App 199 (1987); *Schram v Chambers*, 79 Mich App 248 (1977).

Second, it is well-settled that a statement made as part of a settlement has no binding or res judicata affect whatsoever on anyone not a party to the agreement. Lanzo apparently believes that it can counter the testimony of the plaintiff [Agueros was deposed at great length (Exhibit E) by ***Lanzo's*** attorney in regard to how the accident occurred], and the admissions of its own superintendent and safety director and the unrebutted affidavits of the Wayne Steel foreman and superintendent, by coercing the underlying plaintiff to make an ambiguous statement as part of a settlement. The Michigan appellate courts have never supported such a concept. As indicated in section II of this brief, a party is bound by his/her deposition testimony and cannot create an issue of fact through contradiction of the prior testimony. Agueros has already testified at length as to the conditions and how the accident occurred.

Third, the case law has unanimously held that such statements as part of a settlement have absolutely no binding affect. Contrary to Lanzo's brief (p 30) the statement is not a "judicial admission". The cases cited by Lanzo do not support its position. *Ortega v Landerink*, 382 Mich 218 (1959) (Lanzo's brief, p 30), held that the testimony of the defendant and his counsel's opening statement did ***not*** constitute judicial admissions.

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Similarly in *Tozer v Kerr*, 342 Mich 136 (1955) (Lanzo's brief, p 30), the court held that plaintiff's testimony that defendant was driving "all right" and was a "careful driver" were ***not*** judicial admissions. *Radtke v Miller Canfield*, 453 Mich 413 (1996) (Lanzo's brief, p 30), involved a lengthy discussion why admissions pursuant to requests to admit under MCR 2.312 were "judicial admissions", which has nothing to do with the current case.

Lanzo's brief argues next that Wayne Steel's failure to accept Lanzo's tender of defense bars it from raising any objection to how Lanzo defended the case and that Agueros' "admission" controls as to Wayne Steel. (Lanzo's brief, pp 30-31) This is another baseless argument. Wayne Steel had no duty to defend Lanzo, the indemnity agreement does not apply. Wayne Steel has also established that ***Lanzo's admissions*** in the Agueros case and the current case establish that ***Lanzo*** was ***solely*** negligent.

The reason that Lanzo cannot bind Wayne Steel by an alleged admission as part of a settlement, is that this "admission" has not been the result of any trial or truth seeking process, rather it is only a blatant and failed attempt by Lanzo to exonerate itself.

The Michigan appellate courts have ***always*** held that statements made as part of a consent judgment are ***not*** binding on other parties, because the issues have not been litigated and to argue otherwise would be grossly unjust and contrary to public policy.

In *American Mutual v Michigan Mutual*, 64 Mich App 315 (1975), the Court of Appeals held:

> First, collateral estoppel rules do not require that a consent judgment bind a party to facts which were originally in issue in the action that was settled. A consent judgment reflects primarily the agreement of the parties. *Dora v Lesinski*, 351 Mich 579, 582; 88 NW2d 592 (1958). The action of the trial judge in signing a judgment based thereon is ministerial only. The parties have not litigated the matters put in issue, they have settled. ***The trial judge has not determined the matters put in issue, he has***

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> ***merely put his stamp of approval on the parties' agreement disposing of those matters. But a judgment can be given collateral estoppel effect only as to those issues which were actually and necessarily adjudicated.*** *Howell v Vito's Trucking and Excavating Co*, 386 Mich 37, 42; 191 NW2d 313 (1971). It follows that because the issues involved in the settled case were not actually adjudicated, one of the prerequisites to giving a judgment collateral estoppel effect is not satisfied. Thus, the answer to the question posed above is: Nothing is adjudicated between two parties to a consent judgment.
>
> While the fact that a consent judgment does not satisfy the legal requirements of collateral estoppel is reason enough to reject American Mutual's contention, there are also persuasive policy reasons for denying collateral estoppel status to consent decrees. ***The social interest in reducing instances of costly litigation is undermined by a rule which provides drastic consequences for settlements.*** One will tend to avoid a settlement rather than be later bound in potentially far-reaching, and often unintended, ways by facts imbedded in an otherwise innocuous settlement agreement. Because the application of the doctrine of collateral estoppel to consent judgments will in many cases be unforeseeable, consent judgments may become less desirable, thus impeding and embarrassing the settlement process. As Professor James puts it: 'Any rule which tends to assure contest rather than compromise * * * probably tends, on balance, to increase rather than decrease litigation.'

In the current case, as indicated previously, Lanzo does not even have a consent judgment in its favor. It only has an ambiguous and speculative statement as part of a settlement which has absolutely no binding effect whatsoever.

The rule holding that statements as part of a consent judgment have no collateral estoppel effect has been recognized in numerous Michigan appellate cases including: *Peterson v Lapeer*, 106 Mich App 148, 155-56 (1981); *Berar Enterprises v Harmon*, 101 Mich App 216, 227 (1980); *VanPembrook v Zero Manufacturing Co.*, 146 Mich App 87, 105-106 (1985); *Rzepka v Michael*, 171 Mich App 748, 756 (1988); *Smit v State Farm Insurance*, 207 Mich App 674, 682 (1994).

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The cases cited by Lanzo do not support its position. *Alterman v Provisor*, 195 Mich App 422 (1992) (Lanzo's brief, p 32), contrary to the misstatement in Lanzo's brief, did not deal with admissibility of statements in a settlement, but rather held that the plaintiff's failure to appeal a court's finding that he was not mentally competent to enter a settlement barred him from raising the issue of his competency in regard to the settlement in a subsequent malpractice action. Similarly, in *Monat v State Farm Insurance*, 469 Mich 679 (2004) (Lanzo's brief, p 32), the court held that a finding that a plaintiff was not injured in a third party auto claim was admissible in the same plaintiff's first party no fault claim, because the issue was actually litigated by the plaintiff. These cases are in no way comparable to Lanzo's attempt to bind Wayne Steel to a speculative and ambiguous statement which is directly contrary to Agueros' deposition testimony and all of the evidence, which Lanzo demanded that Agueros make to recover his $125,000 settlement.

In *Lichon v American Universal Insurance*, 435 Mich 408 (1990), the Supreme Court discussed at length how arguments such as Lanzo's must be rejected and that collateral estoppel may not be used to establish anything other than what was actually litigated between identical parties in a prior action.

Lanzo's argument (p 33) that Wayne Steel had a "full and fair opportunity" to litigate the underlying case is as absurd as its other arguments. Wayne Steel was not a party to the underlying case, because ***Lanzo*** chose not to third party Wayne Steel into the case. Nevertheless, the underlying case and the current case establish the facts and evidence of Lanzo's sole negligence.

Lanzo also miscites *American Mutual v Michigan Mutual*, 64 Mich App 315, 327, note 13 (1970) (Lanzo's brief, p 32), that the parties are free to agree that settlements bind them. Certainly the settlement binds the parties to the settlement, but cannot bind a non-party to the

settlement or change testimony or evidence as applied to a non-party as discussed at length in *American Mutual v Michigan Mutual* and all of the other cases on this issue cited above.

SUMMARY

Lanzo has failed to establish that its Application for Leave to Appeal involves issues which involve legal principles of major significance to the state's jurisprudence.

The trial court and Court of Appeals correctly determined that there is no genuine issue of material fact, and that Lanzo was solely negligent, which thus bars its contractual indemnity claim pursuant to MCL 691.991. The coerced statement by the underlying plaintiff which Lanzo required as part of a settlement cannot change the underlying facts and evidence and the Michigan appellate courts have specifically held that a party cannot create an issue of fact through contradiction of prior sworn testimony.

RELIEF REQUESTED

It is respectfully requested that this Honorable Court deny the Application for Leave to Appeal filed by the plaintiff-appellant, Lanzo Construction Company, and affirm summary disposition for the defendant-appellee, Wayne Steel Erectors, with costs to be taxed.

Respectfully Submitted,
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PROOF OF SERVICE

JANICE A. ALBERTSON, being first duly sworn, deposes and says that on the 18th day of May, 2006 she caused to be served a duplicate copy of Answer by Defendant-Appellee, Wayne Steel Erectors, to Application for Leave to Appeal by Plaintiff-Appellant Lanzo Construction Company upon attorneys of record by enclosing a copy thereof in a well sealed envelope to addressed to:

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with full legal postage prepaid thereon and deposited the same in the United States mailbox in the City of Troy.

janice a. albertson
JANICE A. ALBERTSON

Subscribed and sworn to before me
this 18th day of May, 2006.

Lorna M. Grey

LORNA M. GREY
NOTARY PUBLIC WAYNE CO., MI
MY COMMISSION EXPIRES Aug 18, 2006
ACTING IN OAKLAND COUNTY, MI